SRI PERMATA SDN BHD

v.

PPH REALTY SDN BHD;
LINGKARAN CEMERLANG SDN BHD (INTERVENERS)

HIGH COURT MALAYA, IPOH
ABDUL HAMID EMBONG J
[CIVIL SUIT NO: 22-139-2001]
12 OCTOBER 2001

CIVIL PROCEDURE: *Joinder of parties - Intervener's application to be enjoined as second defendant - Rules of the High Court 1980, O. 15 r. 6(2)(b) - Whether intervener falls within the class of persons contemplated in Pegang Mining Co Ltd v. Choong Sam & Ors - Housing Development Account (HDA) - Whether effect of freezing HDA account on intervener merely consequential - Intervener's interests only indirectly affected and commercial - Whether sufficed to enjoin it as party to this action - Whether intervener had equitable interest in HDA account - Whether intervener's rights against defendant affected*

This was an application made by Lingkaran Cemerlang SB (the intervener) to be enjoined as a second defendant in this suit, pursuant to O. 15 r. 6(2)(b) of the Rules of the High Court 1980 (RHC). This court had allowed the plaintiff on its *ex parte* application an interim injunction restraining the defendant from paying out or causing to be paid out any monies deposited into its Housing Development Account (HDA account) in respect of the development of a housing project (the project). The facts were that the plaintiff had entered into a joint venture agreement which involved the defendant who had agreed to construct and complete the balance of units and further develop the land into a commercial area. By a turnkey agreement, the intervener was set up under that joint venture agreement to complete Phase 1B of the project. The project however faced problems and its completion was delayed. The plaintiff thus terminated the joint venture agreement and demanded that the defendant stopped all work immediately.

Pursuant to the termination of the contract by the plaintiff, the intervener's representatives and workers were stopped from entering the project site and could not finish the remaining works. The intervener submitted in support of this application that the temporary freezing of the HDA account by the plaintiff had prejudiced its rights and interest since the intervener had a legal interest in Phase 1B and was responsible to the defendant under the turnkey agreement. The central issue for consideration was whether the intervener was directly affected by the freezing of the HDA account.

Held:

[1] Although the intervener was entitled to the monies in the HDA account, and may participate in that account through an intermediary *ie*, the defendant, the intervener was not directly affected by this court's earlier order. As such, the intervener does not fall within the class of persons as contemplated by the Pegang Mining's test. The effect of freezing the HDA account on the intervener was merely consequential. (p 640 a-b)

[2] The intervener would only be indirectly affected by reason of his collateral obligations and rights under its turnkey agreement with the defendant. The intervener's interest was merely a commercial one and this barely suffice to enjoin it as a party to this action. (p 640c)

[3] The intervener's argument that the intervener had an equitable interest in the HDA account was unfortunately misconceived. The intervener's rights against the defendant was however not affected and the intervener may choose to pursue it, if and when that need arises. As for its liability, the intervener does not owe any to the defendant under the circumstances. Its inability to proceed with the project was entirely the fault of the defendant and a conseqence of the defendant's breach under the joint venture agreement, for which the intervener should not be held responsible. (p 640 d-f)

[Application dismissed with costs.]

Case(s) referred to:

Arab Malaysia Merchant Bank Bhd v. Jamaluddin Dato' Mohd Jarjis [1991] 2 CLJ 862; [1991] 1 CLJ (Rep) 19 ***(refd)***

Gurtner v. Circuit [1968] 1 All ER 328 ***(refd)***

News Ltd v. ARL [1996] 139 ALR 193 ***(refd)***

Pegang Mining Co Ltd v. Choong Sam & Ors [1969] 2 MLJ 52 ***(refd)***

Soo Hong & Leong Kew Moi & Ors v. United Malayan Banking Corp Bhd & Anor [1997] 2 CLJ 548 ***(refd)***

Tohtonku Sdn Bhd v. Superace (M) SB [1992] 2 CLJ 1153; [1992] 1 CLJ (Rep) 344 ***(refd)***

Legislation referred to:

Housing Developers (Control and Licensing) Act 1966, s. 7(7), A(2)

Rules of High Court 1980, O. 15 r. 6(2)(b), O. 53 rr. 4(2), O. 49

Rules of the Supreme Court [UK], O. 15 r. (6)(2)(b)(i), O. 53 r. 5(3)

For the intervener - P Latsmanan; M/s Khor Gaik Thiam & Latsmanan
For the plaintiff - Azmi Ani; M/s Raja Eleena Siew Ang & Assocs
For the defendant - KL Choy; M/s KL Choy & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Hamid Embong J:

Enclosure 10 is an application by the intervener, Lingkaran Cemerlang SB (LC) to be enjoined as a second defendant in this suit, pursuant to O. 15 r. 6(2)(b) of the Rules of High Court 1980 (RHC) or under its inherent power.

On 1 August 2001 this court had allowed the plaintiff on its *ex parte* application, an interim injunction restraining the defendant from paying out or causing to be paid out any monies deposited into its Housing Development Account (HDA account) in respect of the development of a housing project known as Taman Raja Ekram (the project) or to deal with or dispose or encumber the monies available in the HDA account until disposal of this suit. That *ex parte* injunction has now been extended till 12 October 2001, being the date fixed for arguments *inter partes.*

Briefly the facts are as follows. Plaintiff is the registered owner of land known as Lot 70065 Mukim Ulu Kinta. On 14 April 1986 the plaintiff entered into a joint venture agreement with one Syarikat Perumahan Sejati SB (Sejati) to develop the land into a housing estate. On 18 April 1996, Sejati assigned all their rights by a deed of novation cum assignment to the defendant whereby the defendant agreed to construct and complete the balance of 344 units of single storey houses, 121 units of double storey shophouses and further to develop 5.32 acres of the land into a commercial area. The houses and shophouses were to be completed within 24 months from December 1998. The project however faced problems, and its completion was delayed. The plaintiff gave the defendant a number of extensions to complete the project. On 22 May 2001 the plaintiff terminated the joint venture agreement and demanded that the defendant stopped all work immediately.

On 19 July 1997 by a turnkey agreement, the defendant appointed a turnkey contractor ie, one LSSB to build and complete the 65 units under phase 1B of the project. Under that turnkey agreement the defendant would receive 30% of the 65 units whilst LSSB would get 44 units ie, 70%. Subsequently, on 24 April 2000, LSSB and another company ie, Pembinaan Alaf Cemerlang Sdn Bhd entered into a joint venture agreement to build the 65 units on a 50-50 sharing basis of the 44 units given to LSSB under its turnkey contract with the defendant. A new company ie, L.C. the intended intervener was set up under that joint venture agreement to complete phase 1B of the project.

According to LC the 65 units built under phase 1B are now almost completed and awaiting approval from Lembaga Air Perak before certificates of occupation (OC) are issued by the local authority. LC had also incurred expenditure in undertaking the building works and various payments made to government departments and other authorities. On 9 June 2001, pursuant to the termination of the contract by the plaintiff, LC's representatives and workers were stopped from entering the project site and as such could not finish the remaining works. LC also stated in support of this application that the temporary freezing of the HDA account by the plaintiff had prejudiced its rights and interest since LC had a legal interest in phase 1B and is responsible to the defendant under the turnkey agreement to deliver vacant possession of the 65 units to it. It was not disputed that the HDA account was opened and maintained for the purpose of phase 1B. Since some units in phase 1B have been sold and part payments have been made into the HDA account, LC, with the freezing of that account is unable to draw out the monies to make various payments to its suppliers and workers. Also it was contended that the plaintiff itself as the registered landowner and a party to the sale and purchase agreements with the house purchasers was aware that the completion dates of the houses under phase 1B is no earlier than November 2001, and not by 31 December 2000 as contended by the plaintiff. It was also contended that the plaintiff had induced LC to extend the completion dates. As such it was not right for the plaintiff to terminate its agreement with the defendant since there had been no delay in completing phase 1B of the project.

In further submission, learned counsel for LC said that although it was not disputed that there was no privity of contract between LC and the plaintiff, this question was not a basis for its application to intervene. Further the plaintiff was aware of LC's appointment as the turnkey contractor and had impliedly consented to it.

Learned counsel for the plaintiff, in opposing this application, submitted that the plaintiff had no dealing with LC and was not aware of or consented to LC's appointment as the turnkey contractor (referring to plaintiff's letter objecting to LC's appointment in Exh. NI of encl. 14). There was no mention of the appointment of a turnkey contractor in the joint venture agreement with the defendant, and as such LC's appointment was done without the plaintiff's consent and was therefore in contravention of the joint venture agreement, since LC was allowed to participate in the profit sharing in the project. The plaintiff maintained that the completion date to phase 1B was 31 December 2000 and that the dates mentioned in the sale and purchase agreements with the house buyers had no effect on the date as agreed to under the joint venture agreement. It was also submitted that LC's legal obligation was with the defendant and that it had no connection with the plaintiff. With the termination of the JVA, the defendant no longer became the developer of

the Project and so could not manage the HDA account. The monies in the said account should revert to the plaintiff as a result of the termination and could be taken over by a new developer. Under s. 7A of the Housing Developers (Control and Licensing) Act 1966, it is the statutory duty of a housing developer to open and maintain a HDA account. LC, it was submitted has no right to deal with that account and as such its freezing was of no concern to LC.

Criterion For Intervention

Leave to intervene is granted at the court's discretion. In considering whether to allow this application or not, this court is guided by the test enunciated by the Privy Council in *Pegang Mining Co Ltd v. Choong Sam & Ors* [1969] 2 MLJ 52, which has been followed in two decisions of our apex court in *Tohtonku Sdn Bhd v. Superace (M) SB* [1992] 2 CLJ 1153; [1992] 1 CLJ (Rep) 344 and *Arab Malaysia Merchant Bank Bhd v. Jamaluddin Dato' Mohd Jarjis* [1991] 2 CLJ 862; [1991] 1 CLJ (Rep) 19, and a host of other decisions in the High Courts and Court of Appeal. This test may be stated by quoting a short passage from the advice of the Privy Council in *Pegang Mining*. It states:

> A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be **directly affected** by any order which may be made in the action? (emphasis added)

A starting point to consider is by referring to O. 15 r. 6(2)(b) RHC, under which this application is made. It states:

> (2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application:
>
> (a) ...
>
> (b) order any of the following persons to be added as a party, namely:
>
> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter;

The object of the rule can immediately be discerned from the abovementioned rule, and as put by Lord Denning MR in *Gurtner v. Circuit* [1968] 1 All ER 328:

> It enables all matters in dispute to be effectually and completely determined and adjudicated upon between all those directly concerned in the outcome.

This passage essentially repeats what is stated in the English RSC O. 15 r. 6(2)(b)(i) which is in *pari materia* with our equivalent rule. Another principal object of the rule is as was stated by Lord Diplock in *Pegang Mining* which is "to enable the court to prevent injustice being done to a person whose rights will be effected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity to be heard." The Privy Council opined that a flexible approach was called for, but refused to lay down any general proposition for universal application since each case should be decided on its own facts.

Looking at these authorities, both domestic and foreign, including the recent Court of Appeal decision of *Soo Hong & Leong Kew Moi & Ors v. United Malayan Banking Corp Bhd & Anor* [1997] 2 CLJ 548, which confirmed the *Pegang Mining* test, one factor that came out in consonance to qualify the 'rights against or liabilities to' test is that the intervening party must have been **'directly affected'** by any order made by the court on the subject matter. This qualification was formulated by the Privy Council in *Pegang Mining* and as stated by the Court of Appeal in *Soo Hong* remains applicable today in our jurisdiction. The qualifying words 'directly affected' have yet to be interpreted by our courts. According to *Stroud's Judicial Dictionary of Words and Phrases*, 6th edn, these two words are defined (in the context of the RSC O. 53 r. 5(3) [RHC equivalent, O. 53 r. 4(2)]) as follows:

> A person is "directly affected" if he is affected without the intervention of any intermediate agency so that the secretary of state was not "directly affected" within the meaning of Ord. 53 r. 5(3) and could not be joined as a party even though a local authority were required by virtue of a decision in judicial review proceedings to pay housing benefit to an applicant, and the secretary of state had a collateral obligation therefore to increase the authority's annual housing benefit subsidy. (*R v. Rent Officer Service ex p Muldoon* [1996] 1 WLR 1103)

It would seem from this definition that one cannot be said to be directly affected by an order of court if such affection is brought about by an intermediary. As Lord Keith of Kinkel speaking for the House of Lords in *Ex p Muldoon* puts it:

> That a person is directly affected by something connotes that he is affected without the intervention of any intermediate agency.

The qualification as stated in the *Pegang Mining*'s test was recently considered by the full court of the Federal Court of Australia in its decision in *News Ltd v. ARL* [1996] 139 ALR 193 which expressed the following view on this particular aspect of the test:

> In our opinion, the question should be decided according to the test proposed by Lord Diplock. The test involves matters of degree, and ultimately judgment, having regard to the practical realities of the case, and the nature and value of the rights and liabilities of the third party which might be **directly** affected (emphasis by the Federal Court). The requirement that a third party's rights against, or liability to, any party to the proceedings be directly affected is an important qualification that recognises that many orders of a court are likely to affect other people to a greater or a lesser extent. This is particularly so with remedies in the nature of an injunction: see *Silktone Pty Ltd v. Devreal Capital Pty Ltd* [1990] 21 NSWLR 317 at 322, per Kirby P. The requirement of a direct effect on rights or liabilities differentiates the case where a person ought to be joined, from other cases where the effect of the order on non-parties can be characterised as only indirect or consequential.

Back to the instant case. It is common ground that LC had no privity of contract with the plaintiff. In fact LC's appointment as a turnkey contractor was a bone of contention and a basis for the plaintiff's termination of the joint venture agreement with the defendant.

As for the HDA account, it is clear from s. 7A of the Act that the defendant was under a statutory obligation to open and maintain this account. Under s. 7A(2) it is provided that the defendant as the licensed housing developer needs to open and keep a HDA account for each of the phases of development in the case where a housing development is to be developed in phases. Learned counsel for LC had also submitted that the effect of freezing this HDA account tantamounts to its garnishment under s. 7(7), but in my view, this argument is erroneous, since garnishment is a separate execution process under O. 49 RHC which is a consequence of a money judgment already obtained, and where the garnishee is indebted to the judgment debtor.

It was also not disputed that LC had no link to the HDA account. It's complaint is that it could not now draw on that account to make payments to its suppliers and workers. However, even without the restraint now put on the HDA account, LC could not put its hand on it. It is the defendant, as the licensed housing developer, and the defendant alone, that can draw on that account.

The question that needs to be answered now is whether LC is directly affected by the freezing of the HDA account. This is now the central issue for consideration. Although LC's lack of contractual relationship with the plaintiff is irrelevant, reference is made to it to demonstrate the peculiar facts of this

case. In my view, based on the abovecited authorities, the answer can only be in the negative. It is clear, from the facts, that LC, although entitled to the monies in the HDA account, and may participate in that account through an intermediary ie, the defendant, is not so directly affected by this court's earlier order. As such, LC does not fall within the class of persons as contemplated by the *Pegang Mining*'s test. The effect of freezing the HDA account on LC is, as stated by the Australian Federal Court in *News Ltd v. ARL*, merely consequential. As was also stated by that court, "many orders of a court are likely to affect people to a greater or lesser extent - particularly so with remedies in the nature of an injunction". LC would certainly be affected by this court's earlier interim order and it may be said that it would inevitably be affected. But, in my view LC would only be indirectly affected by reason of his collateral obligations and rights under its turnkey agreement with the defendant. It seems to me that LC's interest is merely a commercial one and this barely suffice to enjoin it as a party to this action.

Next, to consider LC's legal interest ie, its "rights against or liabilities to". The rights referred to in the test is a right at law and not a right in equity as was submitted by LC's learned counsel. His argument that LC had an equitable interest in the HDA account is unfortunately misconceived. That LC had no rights to the HDA account needs no further elaboration as this has been considered earlier. LC's rights against the defendant is however, not affected and LC may choose to pursue it, if and when that need arises. As for its liability, this court favours the submissions of learned counsel of the plaintiff who said that that LC does not owe any to the defendant under the circumstances. Its inability to proceed with the project is, entirely the fault of the defendant and a consequence of the defendant's breach under the joint venture agreement, for which LC should not be held responsible.

In conclusion, and shortly put, the intended intervener here had not shown that it has met the test formulated in *Pegang Mining* to move this court to exercise its discretion in allowing it to participate in this proceedings.

For these reasons, leave to intervene is denied and this application is dismissed with costs.